In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1161

LEO CARLINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. 17-25) denying the application for a writ of error *coram nobis* is reported at 279 F. Supp. 295. The opinion of the court of appeals (Pet. 26-29) is reported at 400 F. 2d 56.

JURISDICTION

The judgment of the court of appeals (Pet. 26-29) was entered on July 25, 1968, and a petition for re-

hearing was granted and the opinion modified on October 18, 1968 (Pet. 30-31). A motion to extend the time for filing a petition for a writ of certiorari was filed by petitioner on January 11, 1969, and on January 27, 1969, Mr. Justice Harlan extended the time to March 20, 1969. The petition was filed on March 15, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied without a hearing petitioner's application for a writ of error *coram nobis*.

STATEMENT

Petitioner instituted this action to set aside a judgment of conviction entered in December, 1963, on his plea of guilty to one count of a multi-count indictment.

In 1962 a 20-count indictment was filed in the United States District Court for the Southern District of New York charging petitioner and others with conspiring to evade income taxes and with various substantive offenses of income tax evasion. At the same time petitioner's son, Frank Carlino, and others were charged with tax evasion in a separate indictment. All defendants initially pleaded not guilty (R. 15a-17a, 22a-24a, 27a-42a).

Plea negotiations during the following year culminated in a representation by the government that upon petitioner's plea of guilty to one count of the indictment, the government would at the time of sentencing "make a determination with respect to the remaining

counts" against petitioner. In addition, the government agreed "to carefully consider" the case against petitioner's son, Frank Carlino, before proceeding to trial (Pet. 27). In November, 1963, petitioner, in the presence of his attorney, withdrew his plea of not guilty as to Count II and entered a plea of guilty to that count (R. 13a). Before accepting the plea of guilty the trial judge questioned petitioner about his plea (R. 48a-49a):

> By the Court:
>
> Q. All right, let's start all over again, Mr. Carlino; you want to plead guilty and you have entered such a plea, which I am not too sure I am going to take yet, but I want to find out what you know about it. You are pleading guilty to a charge which says that you violated the Internal Revenue Laws. It says here that on April 14 you filed a return which in effect was a false return for the calendar year 1955, and you filed a joint return at that time on behalf of yourself and your wife, and at that time you said that the taxable income for that year was $54,000 in round figures, and the tax due on that was $22,000, whereas the fact of the matter was that the income was about $70,000 and the tax was about $32,000.
>
> Did you file such a return? A. Yes, sir.
>
> Q. And you knew at the time that you were in effect understating your income by about $25,000? A. Yes.
>
> Q. You did know that? A. Yes, sir.
>
> Q. It was prepared by an accountant for you and then you signed it; is that it? A. Yes, sir.

Q. There is no question in your mind that you knew that this return was a false return when you filed it? A. No, sir.

Q. There is not? A. No, sir.

Petitioner also assured the judge on the record that no promises had been made to him by anyone (R. 49a).

Petitioner was fined $5,000 and sentenced to one year in prison. Petitioner has served his jail sentence and paid the fine. (R. 22a-23a; Pet. 27.)

In 1966, the Commissioner of Internal Revenue notified petitioner of an income tax deficiency and a fraud penalty for 1955, the year involved in the count to which he pleaded guilty. Although petitioner has filed a petition in the Tax Court seeking to contest the deficiency, he finds that the judgment of conviction collaterally estops him from contesting the fraud penalty for 1955. *Moore* v. *United States*, 360 F.2d 353 (C.A. 4), certiorari denied, 385 U.S. 1001. Thus, petitioner's stated motive for seeking a writ of error *coram nobis*—on the ground that his plea of guilty was involuntary—is to free him to contest in the Tax Court the fraud which he admitted by his guilty plea (R. 20a).

ARGUMENT

Petitioner's application for the writ of error *coram nobis* was supported only by his own affidavit in which he stated that his counsel told him that the United States Attorney had "indicated" (R. 17a) that if petitioner and the corporation entered guilty pleas to one count the remaining counts would be dismissed and the charges against petitioner's son would be dismissed.

Even accepting petitioner's allegation as true, there was no basis for invalidating the guilty plea. A mere indication that a subsequent course of action might be followed can hardly be considered as a prosecutorial promise which undermined the validity of the plea. Petitioner stated at arraignment that no promise had been made by anyone. In light of petitioner's unequivocal admission at the time he entered his guilty plea that he had wilfully endeavored to evade his taxes, the district judge was fully justified in rejecting his present claim that he was not guilty and only entered his plea to save his son.

Moreover, even if there was a promise, all the terms as stated by petitioner were carried out; the remaining counts against him, and all the charges against his son were dismissed. Assuming that petitioner pleaded guilty to save his son, that does not render the plea involuntary. "If a defendant elects to sacrifice himself for such motives, that is his choice, and he cannot reverse it after he is dissatisfied with his sentence, or with other subsequent developments." *Kent* v. *United States*, 272 F.2d 795, 798 (C.A. 1); *Cortez* v. *United States*, 337 F.2d 699, 700-702 (C.A. 9); cf. *United States ex rel. Cunningham* v. *Follette*, 397 F. 2d 143, 146 (C.A. 2).

There is no conflict between this case and *Johnson* v. *Wilson*, 371 F.2d 911 (C.A. 9), or *Shelton* v. *United States*, 356 U.S. 26. In *Johnson* a hearing was held to be required because the petition for a writ of habeas corpus sufficiently alleged that the plea of guilty was the product of a coerced confession and of evidence obtained by unlawful search and seizure, that the plea

was itself coerced, and that the defendant did not have the effective assistance of counsel before entering his plea. In *Shelton* the defendant, who was not represented by counsel, had been incarcerated for a long time prior to trial and a government prosecutor allegedly threatened him with an even longer period of pre-trial confinement than the one-year sentence which the prosecutor "guaranteed" would be imposed upon a guilty plea.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

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